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SECRETARIAT
BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

MUR 6379

MCNERNEY FOR CONGRESS ET AL.

2011 JUN 21 P 12: 54

) CASE CLOSURE UNDER THE

) ENFORCEMENT PRIORITY SYSTEM

CELA

SENSITIVE

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System ("EPS"), the Commission uses formal scoring criteria to allocate its resources and decide which cases to pursue. These criteria include, but are not limited to, an assessment of (1) the gravity of the alleged violation, both with respect to the type of activity and the amount in violation, (2) the apparent impact the alleged violation may have had on the electoral process, (3) the legal complexity of issues raised in the case, (4) recent trends in potential violations of the Act, and (5) development of the law with respect to certain subject matters. It is the Commission's policy that pursuing low-rated matters, compared to other higher-rated matters on the Enforcement docket, warrants the exercise of its prosecutorial discretion to dismiss certain cases, or in certain cases where there are no facts to support the allegations, to make no reason to believe findings. For the reasons set forth below, this Office recommends that the Commission make no reason to believe findings in MUR 6379.

In this matter, complainant Donald L. Nelson alleges that McNerney for Congress and Sue Staley, in her official capacity as treasurer ("the Committee"), Jerome C. Pandell, and the Pandell Law Firm, Inc. ("the Firm") violated the Federal Election Campaign Act of 1971, as amended ("the Act"), when the Firm made, and the Committee accepted, a prohibited in-kind corporate contribution.¹ See 2 U.S.C. § 441b; 11 C.F.R. § 114.2(b). Specifically, the complaint alleges that while employed by the Firm, Mr. Pandell drafted and sent a letter on behalf of the Committee to a

¹ Jerry McNerney currently serves as the U.S. Representative from California's 11th District.

1 television station, demanding that the station stop airing a negative advertisement. The complaint
2 argues that while Mr. Pandell may have volunteered his time to write the letter for the Committee,
3 he was nonetheless employed and being compensated by the Firm, and therefore the Firm made a
4 prohibited in-kind contribution to the Committee.

5 The Committee responded and included an affidavit prepared by Mr. Pandell.² According to
6 the Committee's response and Mr. Pandell's affidavit, in September 2010 an outside group began
7 airing advertisements negatively depicting Congressman McNeerney. The Committee asked
8 Mr. Pandell to write a letter on its behalf to the television station airing the advertisements.
9 Mr. Pandell, using his personal computer, drafted a letter on his personal letterhead and e-mailed
10 the letter to the television station using his business email account. The letter stated that
11 Mr. Pandell and the Firm "serve as volunteer legal counsel to the McNeerney for Congress
12 campaign," and requested that the station stop airing the advertisement. Mr. Pandell later made a
13 follow-up call to the station on his personal cell phone. Mr. Pandell maintains that the entire
14 process took no more than four hours. Mr. Pandell further asserts that his supervisors did not ask
15 him to write the letter, he did not use Firm stationary, and, other than using his business email
16 account and office to work on the letter, this activity did not increase the Firm's overhead. Finally,
17 Mr. Pandell states that he works long and irregular hours, and the Firm often allows him to take
18 time off during the day to attend to personal matters. Mr. Pandell maintains that in this case he
19 made up the missed time by working longer hours later in the week.

20

² Jane Curran Pandell, principal of the Firm, and Jerome C. Pandell both filed short responses, adopting and agreeing with the assertions in the Committee's response.

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1 While corporations are prohibited from making contributions to candidate committees, *see*
2 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(b),³ under Commission regulations an individual may
3 volunteer personal services to a campaign without making a contribution as long as the individual
4 remains uncompensated. 2 U.S.C. § 431(8)(B)(i); 11 C.F.R. § 100.74 (the “volunteer exception”).
5 Additionally, a corporate employee may make “occasional, isolated, or incidental” use of corporate
6 facilities to provide volunteer services to a political campaign during paid working hours, provided
7 the employee does not use the facilities more than one hour per week or four hours per month, the
8 time is made up by the employee within a reasonable time, and the activity does not increase the
9 overhead of the corporation and is not performed under coercion. 11 C.F.R. §§ 100.54(a) and
10 114.9(a)(2). Moreover, no corporate contribution results if an individual engages in volunteer
11 Internet activities on behalf of a candidate, such as sending or forwarding messages or any other
12 form of communication distributed over the Internet using computers, software, domain names, and
13 any other technology that is used to provide access to or use of the Internet, regardless of who owns
14 the equipment and services. 11 C.F.R. § 100.94.

15 According to the available information, it appears the work performed by Mr. Pandell, on
16 behalf of the Committee, falls under the safe harbor for individual volunteer activity. *See* 11 C.F.R.
17 § 114.9(a)(2). Specifically, Mr. Pandell’s use of the Firm’s corporate facilities appears to have been
18 incidental. Mr. Pandell’s work for the Committee only took about four hours and Mr. Pandell made
19 up the missed time by working longer hours. Further, it does not appear that the activities
20 performed in Mr. Pandell’s office increased the operating costs of the Firm. Mr. Pandell used his

³ A “contribution” is defined as: (1) “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office,” and (2) “the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.” 2 U.S.C. § 431(8)(A)(i) and (ii); *see also* 11 C.F.R. §§ 100.52 and 100.54.

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personal computer to draft the letter and only used his business email account to send the letter.
Finally, there is no information suggesting that Mr. Pandell was coerced into doing the work.
Therefore, this Office recommends that the Commission find no reason to believe that McNerney
for Congress and Sue Staley, in her official capacity as treasurer, Jerome C. Pandell, and the Pandell
Law Firm, Inc., violated 2 U.S.C. § 441b(a).

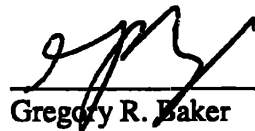
RECOMMENDATIONS

1. Find no reason to believe that McNerney for Congress and Sue Staley, in her official capacity as treasurer, Jerome C. Pandell, and the Pandell Law Firm, Inc., violated 2 U.S.C. § 441b(a).
2. Close the file and send the appropriate letters.


Christopher Hughey
Acting General Counsel

6/21/11
Date

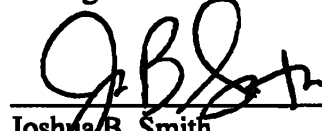
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